IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-156

THE VENDO COMPANY, a Missouri corporation,
Petitioner,

vs.

LEKTRO-VEND CORP., a Delaware corporation,
HARRY B. STONER and **STONER INVESTMENTS, INC.**,
a Delaware corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Introduction

Although the issues before the Court are basically legal in character, respondents concentrate to a remarkable degree on highly inaccurate and vigorously contested factual assertions concerning the merits of respondents' antitrust claim. This is neither the time nor place for a trial of that claim, particularly since its validity or invalidity cannot control resolution of the issues before the Court. However, at the minimum, we feel constrained to point out the following in response:

— With respect to respondents' heavy reliance on statements contained in the District Court's opinion granting the preliminary injunction, the District Court itself admonished (App. 241):

> "The findings contained herein are interlocutory in nature necessarily based on an incomplete record.

> Of course, a complete trial specifically directed to the issues in this case might produce evidence requiring a different or more limited result."

— No court (apart from the District Court's admittedly tentative ruling) has to our knowledge held a non-competition covenant ancillary to the sale of a business or an employment contract to be unlawful under the Sherman Act—let alone *per se* unlawful without regard to market impact (App. 233-34).[1]

— No court (apart from the District Court's admittedly tentative ruling) has to our knowledge held that the "dangerous probability" requirement of proving an alleged attempt to monopolize can be satisfied by an alleged 20% market share (App. 236).[2]

In any event, it is important to reemphasize the nature of the state proceeding which has been enjoined. *First*, it is a proceeding in which Vendo's state-court claim was found to be *meritorious* after exhaustive review. *Second*, the judgments are clearly final and entitled to full faith and credit. *Third*, as the Illinois Supreme Court squarely held, the judgments rest on Stoner's violation of his state-law fiduciary duties and do not depend on the challenged non-competition covenants. *Fourth*, the respondents deliberately rejected a full and fair opportunity to present their federal antitrust defense in the state proceeding.

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[1] See, e.g., *Bradford* v. *New York Times Co.*, 501 F.2d 51, 59 (2d Cir. 1974); *Tri-Continental Financial Corp.* v. *Tropical Marine Enterprises, Inc.*, 265 F.2d 619, 624-625 (5th Cir. 1959); *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825, 837 (7th Cir. 1963). For the background of the 1959 transaction, see Stoner's own signed statement to the Federal Trade Commission (Supplement A *infra*, pp. 29-31).

[2] See, e.g., *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 973-75 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

A. Vendo's Claim Was Found to Be Meritorious—Not Baseless or "Sham"—by the Illinois Courts.

Throughout their brief (e.g., pp. 3, 43-47, 74, 83-84), respondents attack Vendo's state court suit as "harassment" and "not a genuine attempt to use the adjudicative process legitimately". Yet they admit, as they must, that this alleged "harassment" resulted in judgments in Vendo's favor of more than $7,500,000, that those judgments were unanimously affirmed by the Illinois Supreme Court, and that this Court thereafter denied certiorari (420 U.S. 975). Indeed, *all five* of the decisions rendered in the state proceeding agreed that Vendo had a well-founded claim and was entitled to recover damages.

Respondents do not and cannot cite any authority supporting the proposition that such *eminently successful* litigation falls within the "mere sham" exception which this Court in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972), indicated was outside the protection of the *Noerr-Pennington* doctrine. See, e.g., *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285, 290 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). A single suit, brought by a single party not acting in concert with anyone else, cannot possibly be characterized as a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts"—the situation dealt with in *California Motor Transport, supra*, 404 U.S. at 515.

Furthermore, in its subsequent decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court expressly recognized that the institution of litigation is protected from antitrust liability under the *Noerr-Pennington* doctrine except where the intention to suppress competition is *"evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus within the 'mere*

sham' exception. . . ." (410 U.S. at 380, italics added).[3] Not one such characteristic is present here.

In any event, even in the different situation where "mere sham" litigation is involved, neither *California Motor Transport* nor *Otter Tail* remotely purports to authorize *injunctions against pending state proceedings.*

B. The Judgments Are Clearly Final and Entitled to Full Faith and Credit.

This is not a case, furthermore, where a federal court undertakes to enjoin a state proceeding in its incipiency. On the contrary, after a decade of litigation, the judgments are fully reviewed (including this Court's denial of certiorari), clearly final, and ready for enforcement.

Respondents nevertheless attempt to deny that the state judgments are entitled to full faith and credit (p. 83). Respondents' contention is clearly erroneous. It is well-established that a final judgment entered by a state court of competent jurisdiction must be given full faith and credit, not only by courts of other states, but by federal courts as well (Act of May 26, 1790, 1 Stat. 122, codified at 28 U.S.C. § 1738).

Equally frivolous is respondents' contention that federal nullification of a final state judgment is preferable to "federal interference in the state court's ongoing adjudication of the substantive issues in the case" (p. 73). Respondents thus ignore the fact that the judgments are final and entitled to full faith and credit. On that basis, respondents

[3] See also the very recent decision of the Ninth Circuit in *Franchise Realty Interstate Corp.* v. *San Francisco Culinary Workers,* 1976-2 Trade Cases ¶ 61,102 (9th Cir.), similarly recognizing that ". . . defendant's instigation of the litigation [is] a right guaranteed by the First Amendment. . . ." (p. 69,990). The Court also pointed out: "We know of no case that holds that joint action that succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act" (p. 69,986, n. 2).

also contend that the preliminary injunction "Infring[ed] no significant state interest" (p. 35) and "Did Not Unduly Infringe Any Significant State Interest" (p. 71). It is difficult to conceive of a state interest more significant than the jurisdiction of its courts, the finality and integrity of their judgments, and the enforcement of state-law rules as to fiduciary conduct. See, e.g., *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 608 (1975).

C. The State Court Judgments Rest on Stoner's Violation of His Fiduciary Duties and Do Not Depend on the Challenged Non-Competition Covenants.

Respondents' brief (e.g., pp. 41, 74, 82) is also based on the premise that, if Vendo were allowed to collect its final judgments, it would somehow be enforcing the non-competition covenants in the 1959 agreement. But the most elementary review of the Illinois Supreme Court's decision (App. 100-23) demonstrates respondents' error.

The Illinois Supreme Court held that Stoner violated his fiduciary duties as a director and officer of Vendo by misappropriating a Vendo business opportunity, by secretly giving substantial financial support to the development of the Lektro-Vend machine, and by failing to disclose to Vendo the full extent of his association with the Lektro-Vend project (App. 111-13). The Court further held that Stoner's liability to Vendo for his violations of his fiduciary duties was entirely independent of the non-competition covenants—i.e., "[q]*uite apart from any liability which may be predicated upon a breach of the covenants against competition . . .*' and "[r]*egardless of the appellate court's disposition of those restraint-of-trade issues. . . .*" (App. 111, 117, italics added).

The District Court sought to circumvent this fundamental fact on the theory that Stoner "would not have become a

corporate director of Vendo absent entry of the anticompetitive agreements" and that "[t]he 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart" (App. 234-235). But the Illinois Supreme Court expressly based its decision on Stoner's *tort,* not any contract provision, and there is no need to "snip apart" the 1959 agreements. Thus, the severability or non-severability, or enforceability or non-enforceability, of any contract provision, is irrelevant. The fiduciary duties which Stoner violated were imposed, according to the Illinois Supreme Court, as a matter of law apart from any contractual provision between the parties, and there is no conceivable reason why Stoner should be relieved of those duties or the adjudicated liability for his violation of those duties. See, e.g., *Singer* v. *A. Hollander & Son, Inc.,* 202 F.2d 55, 59 (3d Cir. 1953).

Thus, even assuming *arguendo* that the covenants were illegal as respondents claim, such illegality would provide no basis for enjoining collection of the state court judgments.

Respondents argue at length (pp. 36, 43-47) that "The District Court Found That Petitioner's Efforts To Collect The Balance Of Its Judgments Would Further A Violation Of The Federal Antitrust Laws." But, as pointed out in petitioner's main brief (p. 14), the District Court did not and could not find that collection of the judgments would itself violate the antitrust laws. Instead, the District Court at most merely opined—on the basis of its erroneous "snipping-one-piece-of-anticompetitive-cloth" theory—that the entire litigation was somehow tainted by the challenged covenants and Vendo's alleged anticompetitive purpose. Any such conclusion ignores *inter alia* the square holding of the Illinois Supreme Court sustaining Vendo's right to recover on the basis of independent fiduciary duties. Cf. *Kelly* v. *Kosuga,* 358 U.S. 516, 518-21 (1959).

Whatever may be the propriety of respondents' claim for treble damages, the relief granted below—a federal injunction barring enforcement of final state judgments—is manifestly improper.

D. Respondents Deliberately Rejected a Full and Fair Opportunity to Present Their Federal Defense.

Not only do respondents attack the final, fully reviewed judgments of the state courts on grounds which they could have presented to the state courts by way of defense, but the respondents do so on grounds which they actually *did* present, which the state courts held they were *entitled* to present, and which *would have been adjudicated* by the state courts except for respondents' *deliberate withdrawal* of those issues from the state proceeding. Respondents thus seek (and so far have been permitted) to nullify, by way of a federal injunction, the results of state court proceedings in which they were given a full and fair opportunity to present the very issues which they asserted many years later as grounds for the injunction.

I. THE PRELIMINARY INJUNCTION IS BARRED BY 28 U.S.C. § 2283

A. Section 16 of the Clayton Act Does Not "Expressly Authorize" an Injunction to Stay State Court Proceedings.

1. Respondents Urge a Flagrant Misapplication of This Court's Mitchum Decision Which Would Nullify § 2283.

Contrary to respondents' assertions, § 16 of the Clayton Act plainly does not satisfy the criteria enunciated by this Court in *Mitchum* v. *Foster,* 407 U.S. 225 (1972), for determining whether a statute falls within the "expressly authorized" exception to § 2283. Indeed, if respondents' interpretation of *Mitchum* were adopted, not only § 16 but literally dozens of other federal statutes similarly authorizing private injunction remedies would also fall within the

"expressly authorized" exception.[4] The effect of adopting such an interpretation would be to make § 2283 a nullity.

Unlike the statutory provision at issue in *Mitchum*—§ 1983 of the Civil Rights Act—§ 16 is not a statute which "created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding" or that "could be given its intended scope only by the stay of a state court proceeding". (407 U.S. at 237-38.)

In holding that § 1983 fell within the "expressly authorized" exception, the Court stressed that § 1983 created a "uniquely federal" remedy in the sense *that it directly concerned and altered the relationship between the States and the Federal Government.* The Court explained:

> "The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment... [T]he role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.... Section 1983 opened the federal courts to private citizens, offering *a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.*" (407 U.S. at 238-39, italics added.)

The Court also emphasized, after an exhaustive review of the statute's legislative history, that

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples' federal rights—to protect

[4] A partial listing of such statutes—by no means necessarily exhaustive—is set forth *infra*, pp. 10-11 n. 7.

> the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, *or judicial.*'" (407 U.S. at 242, italics added.)

Furthermore, in enacting § 1983, "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights" (*ibid.*).

Section 16 of the Clayton Act clearly is not a statute of this type. Although respondents (pp. 55, 52) contend that "Both the clear terms and legislative history" of § 16 show that its 'intended scope' would be 'frustrated' if the courts were powerless to issue an injunction", they point to nothing in the terms[5] or history of § 16 which indicates that Congress was concerned in any way with state court proceedings (or any other form of state action) in enacting § 16 or that it was even contemplated that the authority conferred by § 16 might be used to enjoin state court proceedings. Instead, respondents (p. 57) simply rely on Congress' general intent to make antitrust injunctive relief available to private plaintiffs as well as to the Government.

Respondents' argument could scarcely be more simplistic: They contend (1) that a § 16 injunction is a "uniquely federal" remedy because only federal courts are empowered by § 16 to issue such injunctions and (2) that the application of § 2283 here would "frustrate" the "intended scope"

[5] If anything, as pointed out in our main brief (pp. 23-24), the text of § 16 is precisely to the contrary. Undeterred, respondents (p. 56) invoke "the familiar rule of statutory construction, that '*inclusio unius est exclusio alterius*'", arguing that § 16 prohibits injunctions against common carriers but "makes no reference whatsoever to injunctions against state court proceedings". Respondents ignore, however, that § 2283 is a prohibition of general applicability to all federal statutes except for those held to be within the "expressly authorized" exception.

of § 16 because (allegedly) a § 16 injunction would otherwise be proper *in this case* in the absence of § 2283.[6]

As already pointed out, such an analysis of *Mitchum* not only perverts the rationale of that decision but would make a nullity of § 2283. The whole object of § 2283 is to bar injunctions against state court proceedings which might be appropriate apart from § 2283. In fact, if it were otherwise, then the "expressly authorized" exception would also permit injunctions under a great many other federal statutes which, like § 16, empower federal courts (but do not empower state courts) to grant private injunctive relief.[7]

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[6] Respondents attempt to deny that adoption of their position would exempt every § 16 injunction from § 2283, on the ground that "Section 16 only authorizes injunctions against 'threatened loss or damage *by a violation of the antitrust laws*' " (p. 63, italics the respondents'). But this is to argue in a circle. As respondents acknowledge, there can be no injunction under § 16 unless it meets the quoted test. See, e.g., *Mullis* v. *Arco Petroleum Corp.*, 502 F.2d 290, 293 (7th Cir. 1974) (per Stevens, J.). Since respondents propose the same test to override § 2283, any injunction that meets the § 16 test would thereby also be exempt from § 2283.

[7] E.g., 7 U.S.C. § 216 (§ 315 of the Packers and Stockyards Act of 1921); 7 U.S.C. § 2050a (Farm Labor Contractor Registration Act); 7 U.S.C. § 2305(a) (§ 6 of the Agricultural Fair Practices Act of 1967); 12 U.S.C. § 1731b(i) (§ 513 of the National Housing Act); 12 U.S.C. § 1976 (Bank Holding Company Act); 15 U.S.C. § 78aa (Securities Exchange Act); 15 U.S.C. § 298 (relating to the false stamping of gold and silver); 15 U.S.C. § 433 (providing for suits by farmers' cooperative associations against discrimination by boards of trade); 15 U.S.C. §§ 1114 (2), 1116, 1121 (providing for injunctive relief against trademark infringement); 15 U.S.C. § 2073 (Consumer Product Safety Act); 15 U.S.C. § 2102 (Hobby Protection Act); 17 U.S.C. § 112 (providing for injunctions against violation of any right secured by the copyright laws); 26 U.S.C. § 9011(b) (Presidential Election Campaign Fund Act); 29 U.S.C. § 412 (Labor-Management Reporting and Disclosure Act); 42

(Footnote continued on next page)

Precisely the same argument which respondents make about § 16 could be made about each of these other statutes as well. Thus, it could be argued (1) that each such statute creates a "uniquely federal" remedy because only federal courts are authorized to issue an injunction under the statute and (2) that application of § 2283 would "frustrate" the "intended scope" of the statute in any case where an injunction under the statute would be proper in the absence of § 2283. Respondents' argument thus proves too much. Acceptance of such an argument would result in the "expressly authorized" exception almost swallowing the entire prohibition—notwithstanding this Court's repeated admonitions that the exceptions to § 2283 are to be strictly and narrowly construed. See, e.g., *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970); *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U.S. 511, 514 (1955).

2. The Cases Relied upon by Respondents either Are Patently Inapplicable or, If Applicable, Support Petitioner

Respondents' brief fails to cite a single decision which, prior to the District Court's decision in this case, had ever

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(Footnote continued from previous page)

U.S.C. § 2000e-5 (Title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964); 42 U.S.C. §§ 6305, 6395(e) (Energy Policy and Conservation Act); 45 U.S.C. § 547 (Title III of the Rail Passenger Service Act of 1970); 49 U.S.C. §§ 1(20), 322(b)(2), 916, 1017(b) (Interstate Commerce Act); 49 U.S.C. § 1487(a) (Federal Aviation Act). See also 16 U.S.C. § 1540(g) (Endangered Species Act of 1973); 33 U.S.C. § 1365 (Federal Water Pollution Control Act); 33 U.S.C. § 1415(g) (Marine Protection Research and Sanctuaries Act of 1972); 33 U.S.C. § 1515 (Deepwater Ports Act of 1974); 42 U.S.C. § 300j-8 (Safe Drinking Water Act); 42 U.S.C. § 1857h-2 (Clean Air Act); 42 U.S.C. § 4911 (Noise Control Act of 1972).

held § 16 "expressly authorized" injunctions against state court proceedings.[8] Instead, respondents rely on a variety of cases having little if any relevance to the issue presented.

For example, they rely on *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 177 (1942); *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398, 401 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); and *Mach-Tronics, Inc.* v. *Zirpoli*, 316 F.2d 820, 830 (9th Cir. 1963). Not one of these decisions involved—or even indirectly supports—the issuance of an injunction against state court proceedings. All four decisions involved antitrust treble-damage actions. The issue before this Court, however, is not what effect the state court proceedings or judgments may have on respondents' treble-damage action, but rather the power of the District Court to *enjoin* the state court proceedings (more specifically, enforcement of final state court judgments).

Respondents' extensive reliance throughout their brief on the *Lyons* case, *supra*, is particularly misleading. *Lyons* merely held that a federal antitrust action for treble damages should not be stayed until a related state case is

[8] Concerning the *Studebaker*, *Helfenbein*, and *Bayer* cases, see petitioner's main brief, pp. 25-26 n. 11.

Katz Drug Co. v. *Sheaffer Pen Co.*, 6 F. Supp. 212 (W.D. Mo. 1933), is based on a theory of "inherent power" subsequently overruled by this Court in the *Atlantic Coast Line* and other cases.

Philadelphia World Hockey Club, Inc. v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), does not even mention § 2283 and the circumstances involved there are unknown.

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), merely contain generalized statements about the value of private antitrust enforcement and did not even involve injunctions against state court proceedings or any aspect of federal-state relations.

decided.[9] Respondents (pp. 37, 41, 53, 75) quote repeatedly from the Second Circuit's opinion to the effect that a federal court's "exclusive jurisdiction" over treble-damage actions is "untrammeled" by prior state adjudications. Quite apart from the fact that neither the holding nor dicta concern issuance of an injunction against state court proceedings, respondents neglect to inform this Court that on rehearing the Second Circuit issued an additional opinion (222 F.2d at 195-96) substantially retracting the statements quoted by respondents. Even more strikingly, in an earlier opinion in the same case, the Second Circuit affirmed the denial of an

[9] In *Mach-Tronics*, as in *Lyons*, the Court held that a federal antitrust treble-damage action should not be stayed until a related state case is decided. The case does not give the slightest support to issuance of a preliminary injunction against state court proceedings.

In *Sola Electric*, the holding was simply that a patent licensee is not estopped by his license agreement from challenging a price fixing clause in the agreement by showing that the patent is invalid. No state court proceeding was involved. The language of the opinion which respondents (pp. 76, 82) twice quote ("Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful. . . ."—317 U.S. at 177) merely confirmed the applicability of federal substantive law to a federal cause of action and has nothing at all to do with the issues in this case.

In the *Janel* case, Lanvin previously had obtained an injunction in state court enjoining Janel from selling Lanvin perfumes at a price below the established fair trade price. In the subsequent federal treble-damage action based on Lanvin's alleged violation of § 1 of the Sherman Act, the Second Circuit held that the state court decision enjoining violation of the state fair trade law was not binding on the federal court. The Court did not hold or in any way imply that the federal court could enjoin enforcement of the state injunction. Indeed, the Second Circuit noted that *"Of course, there can be no damages arising from the state court injunction, even if the issuance of it was in error. Plaintiff's remedy for an erroneous state court decision rests in the state courts."* (396 F.2d at 401 n. 2, italics added.)

injunction against the state court proceeding on the ground that it was barred by § 2283, "even though the [federal] Anti-Trust Laws are involved in both actions, as in this case." *Lyons* v. *Westinghouse Electric Corp.*, 109 F.Supp. 925 (S.D.N.Y. 1952), *aff'd per curiam*, 201 F.2d 510 (2d Cir.), *cert. denied*, 345 U.S. 923 (1953).

Respondents also refer to *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), and *Porter* v. *Dicken*, 328 U.S. 252, 255 (1946). In *Leiter*, the Court approved an injunction directed against a state court proceeding, but the case has nothing to do with the "expressly authorized" exception to § 2283. As pointed out in *Mitchum*, 407 U.S. at 235-36, *Leiter* involved "[s]till a third exception, more recently developed, [which] permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests'." Respondents (pp. 60-62) attempt to use *Leiter* to argue that, since a Government antitrust action seeking injunctive relief would not be subject to § 2283, a private antitrust plaintiff purporting to sue under § 16 as a "private attorney general" should also not be barred by § 2283. This argument, however, is directly contrary to the decision in *Leiter*, where the Court explained that

> "There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." (352 U.S. at 225-26.)

Like *Leiter*, this Court's decision in *Porter* v. *Dicken*, *supra*, also involved a suit by a federal agency. The suit, moreover, was brought under a statutory provision which only authorized Government suits—a point which respondents conveniently ignore in their purported comparison of § 16 with the statute involved in *Porter*, the Emergency Price Control Act of 1942.[10] That Act established a wartime system of judicial remedies, specifically authorized the Administrator to bring enforcement actions in both state and federal courts, and at the same time specifically barred any suit *against* the Administrator in any state court or in any federal court other than the specially created Emergency Court of Appeals. See also the Court's earlier decision in *Bowles* v. *Willingham*, 321 U.S. 503, 511 (1944). Not only were the federal actions in both *Bowles* and *Porter* brought by the Government but also the state proceeding in the foundation *Bowles* case was brought to enjoin the Administrator and thus was specifically barred by Congress. In contrast, the federal action in the instant case was brought by a private party and there can be no question concerning the jurisdiction of the state court.

Unlike the Emergency Price Control Act, the other seven statutes which this Court has recognized to be within the "expressly authorized" exception provide for injunction suits by private parties. But, in contrast with § 16, each of those seven statutes relates directly to the allocation of functions between state and federal courts. Furthermore, in contrast with § 16, each of those seven statutes either contains language specifically allowing stays of state proceedings or requires by its very nature that conflicting state

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[10] Respondents (p. 54) assert that the Emergency Price Control Act "invested both the state and federal courts with jurisdiction to enforce its provisions". However, as this Court noted in *Bowles* v. *Willingham*, 321 U.S. 503, 511 n. 6 (1944), this concurrent jurisdiction embraced "only enforcement suits brought by the Administrator, not suits brought to restrain or enjoin enforcement of the Act or orders or regulations thereunder."

proceedings must be enjoined to achieve the fundamental purpose of the statute. In sum, to classify § 16 within the "expressly authorized" exception would radically depart from the settled interpretation of § 2283.

B. The Injunction Was Not "Necessary in Aid of" the District Court's Jurisdiction.

Respondents' brief is devoid of any authority supporting their position with respect to the second exception to § 2283. Indeed, they have not cited a single case in which this exception to § 2283 was held to apply. Instead, respondents (pp. 65-68) simply attempt to distinguish the authorities cited in petitioner's main brief which demonstrate that the preliminary injunction was *not* "necessary in aid of" the District Court's jurisdiction.

The District Court's holding (which was not relied upon by the Court of Appeals) that the injunction was "necessary in aid of" its jurisdiction was based solely on the premise that "further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo" (App. 241). The District Court's holding is erroneous on several grounds.

First of all, contrary to respondents' assertion (pp. 47, 66), the District Court made no finding that any antitrust "claims" would be "extinguished." Second, the legal standing of Stoner (or his representative) would be unaffected in any event. Third, there is no basis for the District Court's statement that Stoner Investments and Lektro-Vend Corp. "would necessarily be controlled by Vendo"; it is equally plausible that a third party would have purchased Stoner's interest in those two companies.

Fourth, if there were any justifiable concern that Stoner Investments and Lektro-Vend Corp. "would necessarily be controlled by Vendo," such control could have been prevented by a simple order to that effect. Indeed, as pointed out in our main brief (pp. 13, 19, 35), Vendo had offered consent decrees which would eliminate any possibility of Vendo's acquiring control of Stoner Investments and Lektro-Vend. Therefore, an injunction against enforcement of the state court judgments was not even "necessary" to prevent Vendo from acquiring such control—let alone "*necessary*" to the District Court's jurisdiction.[11]

Fifth, and even more important, not a single authority is cited by either the District Court or by respondents which holds that a federal court may enjoin a state court proceeding for the purpose of preserving the existence of a "case or controversy" between some (as here) or even all the parties in a lawsuit pending in the federal court. It is not difficult to conceive of a wide variety of situations in which the outcome of a state court proceeding might affect the legal status of one or more of the plaintiffs in a federal suit. Clearly, however, the important Congressional policy embodied in § 2283—"to prevent needless fric-

[11] Respondents assert that the first proposed consent decree would not prohibit Vendo from purchasing at a sheriff's sale Lektro-Vend stock owned by Stoner Investments. However, under the consent decree (App. 210), Vendo would have been required to divest any such Lektro-Vend stock it might acquire, with the stock placed in a voting trust pending divestiture to assure that Vendo could not obtain voting control. And Vendo's second proposed consent decree (App. 258-59) would have even prohibited Vendo from acquiring or attempting to acquire directly or indirectly any of the stock of Stoner Investments or Lektro-Vend.

Respondents also assert that even though Vendo could not have acquired control "petitioner would have been wholly unrestricted from precipitating the immediate liquidation of the majority interest in both corporations" (p. 49). However, the mere fact that ownership of the stock of Stoner Investments and Lektro-Vend Corporation might pass to some third party would not eliminate the "case or controversy" between those plaintiffs and Vendo. Nor would it "extinguish" any antitrust claim they have.

tion between state and federal courts" (*Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1939)) —would not be served if the federal courts were authorized to enjoin the state court proceedings in such circumstances.

Respondents' reliance (pp. 39, 65) on *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970), is entirely misplaced. In that case, the Court held that a federal injunction against enforcement of a state court injunction against union picketing was *not* "necessary in aid of" the federal court's jurisdiction even though the federal court itself previously had refused to grant an injunction against the picketing and even assuming that the state court improperly granted the injunction because the picketing was protected by federal law from the state court interference. The Court emphasized that

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much and the fundamental principle of a dual system of courts leads inevitably to that conclusion." (398 U.S. at 297.)

The Court also stated (p. 295):

> "It is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case . . . [N]o such situation is presented here."[12] (Italics the Court's.)

Ignoring the holding in *Atlantic Coast Line* and this Court's strong emphasis on the need to construe the exceptions to § 2283 narrowly, respondents (p. 66) assert that in this case "[f]ar more is at stake than mere 'flexibility and authority' to decide" their treble-damage claims because collection of Vendo's state court judgments would " 'eliminate two of the plaintiffs herein'." As already pointed out, not only is this factually incorrect, but it has nothing at all to do with the *jurisdiction* of the District Court. Preserving a federal court's "flexibility and authority to decide" a case is not the same thing as preserving the continued existence of one of the litigants or its ability to finance the prosecution of its federal claim. Compare *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 780 (3d Cir. 1975). Contrary to respondents' assertion (p. 67), "the very authority of the federal court" to determine the issues in respondents' treble-damage action is *not* "at stake."

There only remains for brief consideration the respondents' fanciful assertion (pp. 47, 49) that Vendo seeks to

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[12] The Court also observed that only it has potential appellate jurisdiction over federal questions raised in state court proceedings "and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions 'necessary in aid of' its jurisdiction" (398 U.S. at 296). The Court stated (*ibid.*):

> "If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well."

But, the Court held, the union was not entitled to any relief against the state court in the federal district court.

"thwart" respondents' treble-damage action. Not only did the District Court make no such finding, and not only was Vendo's state court suit filed *before* the respondents' federal action, but furthermore as recently as November 1, 1976, counsel for the respondents assured the District Court in this case that the treble-damage action will be unaffected *irrespective of whether this Court affirms or reverses the grant of the preliminary injunction.*[13] Moreover, as the record in this case clearly demonstrates (see Supplement B, *infra,* pp. 32-35), it was respondents who "thwarted" their own case by persistently seeking and obtaining delay of this federal case pending resolution of Vendo's state court suit. Vendo, by contrast, expressed its readiness and willingness to proceed to trial without waiting for completion of review of its state court judgments.

Respondents' effort to bring themselves within the "in aid of jurisdiction" exception, like their effort to show that § 16 "expressly authorized" the injunction, cannot be sustained.

II. THE INJUNCTION VIOLATES PRINCIPLES OF COMITY AND FEDERALISM.

Even though the enjoined judgments were clearly final and entitled to full faith and credit, the Court below held that comity and federalism were inapplicable in an action under § 16 of the Clayton Act on the ground that respondents' "exclusive remedy" was in the federal courts. Re-

[13] At the status report on November 1, 1976, Judge Will inquired (Transcript, p. 8): "Where do we stand because I gather what the Supreme Court is going to consider doesn't effect the underlying case in any event."

Counsel for respondents (Mr. Baker) replied: "I think that is right."

The Court reiterated: "... I take it this case will be alive whether the Supreme Court raises the injunction or doesn't raise the injunction...."

Mr. Baker agreed: "That is right."

spondents seek to sustain that holding on a variety of grounds.

Thus, respondents (pp. 74-75) argue that federal district courts were "invested by Congress with an exclusive jurisdiction to pass upon the claims at bar." However, it is utterly beyond dispute (as respondents themselves argued and as the Illinois Appellate Court specifically held in this case) that the Illinois courts had jurisdiction to pass upon precisely the same issues in connection with respondents' federal antitrust defense. It is equally clear that this Court had jurisdiction to pass upon those same issues on certiorari from the state courts' adjudication of the federal antitrust defense. Respondents, however, chose to abandon that defense, requested and obtained its dismissal at the opening of the second trial in the state case in 1971,[14] and did not at any time thereafter seek to reassert that defense in the state suit.

Respondents thus not only failed to utilize the opportunity afforded them by the state courts, but they actually *refused* to do so. Indeed, they deprived the state courts (and therefore this Court as well) of all opportunity to consider the federal antitrust issues. Yet, once the state court judgments had become final, respondents immediately sought and obtained an injunction against those judgments on precisely the same grounds which they had refused to allow the state courts to adjudicate.

[14] Respondents' withdrawal of their defense "without prejudice" constituted, at most, a reservation of their right to reassert it prior to final judgment—not the right to reassert it after final judgment and in a different court. See Ill. Rev. Stat. Ch. 110, §§ 46, 72; *Shapiro* v. *DiGuilio,* 132 Ill. App. 2d 428, 434, 270 N.E. 2d 622, 627 (1971). Nor are respondents somehow relieved of the federal consequences of their withdrawal of the defense by the fact that Vendo (not surprisingly) did not object to the withdrawal. Lektro-Vend, although not a party in the state litigation, is completely controlled by and in privity with the other two plaintiffs and stands in no better position (App. 239).

Such a procedure is completely antithetical to fundamental principles of comity and federalism. This Court has consistently denied relief to litigants who seek in federal court to enjoin or set aside a state court proceeding without having satisfied the necessary requirement imposed by this Court "that a State's judicial system . . . be fairly accorded the opportunity to resolve federal issues arising in its courts . . . ." *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 609 (1975). See also *Younger* v. *Harris*, 401 U.S. 37, 49 (1971); *Stone* v. *Powell*, 96 S. Ct. 3037, 3052 (1976). [15] On this basis alone, the District Court should have declined to issue its injunction.

Respondents also contend that the principles expressed in *Younger* and *Huffman* do not apply where federal injunctions are requested against state civil suits, other than "quasi-criminal" proceedings of the type dealt with in *Huffman*. As noted in *Huffman*, however, several Courts of Appeals have applied *Younger* when the pending state proceedings were purely civil in nature.[16] Such decisions include cases where the pending state proceedings involved disputes between private litigants, as well as cases where such proceedings involved a suit against a state governmental body or officer. Indeed, no Court of Appeals has held that the doctrine of *Younger* and *Huffman* should bar

[15] Respondents incorrectly characterize this issue as one of "waiver." On the contrary, it involves the respect which this Court requires to be accorded to a state judicial system which has provided respondents with a full and fair opportunity to litigate the federal issue. *Huffman, supra*, 420 U.S. at 610-11.

[16] 420 U.S. at 607. See also, in addition to the cases cited there, *Louisville Area Inter-Faith Committee for United Farm Workers* v. *Nottingham Liquors, Ltd.*, No. 75-1901 (6th Cir., September 29, 1976); *Ahrensfeld* v. *Stephens*, 528 F. 2d 193, 197 (7th Cir. 1975); *King* v. *Jones*, 450 F.2d 478 (6th Cir. 1971), *vac. as moot*, 405 U.S. 911 (1972). *Contra, Hernandez* v. *Danaher*, 405 F. Supp. 757 (N.D. Ill. 1975), *prob. jur. noted*, 96 S. Ct. 2622 (1976).

a federal injunction only where the state proceedings are criminal or quasi-criminal in nature.[17]

Moreover, while it may be that comity-federalism considerations are of particular weight in connection with state criminal and quasi-criminal proceedings, surely it is also true that comity-federalism considerations are of particular weight with respect to a state proceeding which (as here) *has gone to final judgment and is entitled to full faith and credit*. As this Court noted in *Huffman, supra*, 420 U.S. at 608:

> "Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts."

Such considerations apply with even more force when the state trial court's judgment has been fully reviewed and affirmed on appeal by the state's highest tribunal.

As already noted, respondents also make the incredible argument that the preliminary injunction in this case "Infring[ed] no significant state interest" (p. 35) and "Did Not Unduly Infringe Any Significant State Interest" (p. 71). Even apart from the important interests of a state in the finality of its judgments, state courts could not provide an effective forum for adjudication if state court defendants were permitted to withhold applicable defenses from the state courts and, in the event of an adverse result there, seek federal relief on the grounds asserted in the withheld

[17] Neither does any statement made by this Court in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (Resp. Br. 71), so indicate. In fact, in that case, this Court held that under the circumstances the federal suit had properly been dismissed in deference to a state suit filed *after* the federal suit.

defenses. Such a procedure, if permitted, would impugn the very integrity of the state judicial system. Moreover, it would seriously complicate and interfere with the prevention and redress by the state courts of violations of important state-imposed legal duties, including, as in this very case, the duties of fidelity and trust imposed upon officers and directors of a corporation.[18]

Respondents also seek to justify the procedure they employed by repeatedly asserting (pp. 40, 77, 80) that there was an "understanding" or "agreement" with Vendo that the federal proceedings be delayed until completion of the state proceeding. Contrary to those assertions, there most certainly was no such "agreement" or "understanding." Indeed, petitioner vociferously protested against such delay on several occasions. On the other hand, respondents persistently sought and obtained delay of the federal proceeding, even claiming that it would have been a "waste of the [federal] Court's time" to proceed with the federal suit while the state suit was still pending. (See Supplement B, *infra*, pp. 32-35.) They did not reactivate this federal case and move to enjoin the state proceeding until after they had finally lost their contest in the state courts. Unsuccessful in a state forum which undisputably afforded them a full and fair opportunity to raise all pertinent issues, they then

[18] Respondents misleadingly assert that their "attempts to gain relief under Illinois antitrust law were supported . . . by the Illinois attorney general." (Resp. Br. 72-73.) In reality, the interest of the Attorney General, who appeared as *amicus curiae* in the state court appellate proceedings, was limited to supporting the legal proposition that the Illinois Antitrust Act applied to interstate as well as intrastate commerce. The Illinois legislature subsequently clarified the ambiguity of the Illinois Act, but the issue was mooted in the *Vendo* case by the Illinois Supreme Court's decision that the Illinois Act (enacted in 1965) could not, in any event, be applied retroactively to prior transactions (App. 117-18).

seized upon any possible means to escape the effects of the adverse decision rendered there.[19]

In support of their claim that principles of comity and federalism are inapplicable, respondents cite a number of other cases which are simply irrelevant to the issues presented here.

As already noted (*supra*, pp. 12-14), respondents wholly misconstrue *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) (see Resp. Br. 76, 82), and *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) (Resp. Br. 79). Neither decision remotely sanctions—or even involved—federal injunctions against state court proceedings. Moreover, with respect to the *Lyons* case, respondents disregard the Second Circuit's other two opinions in the case: its opinion on rehearing (222 F.2d at 195-96) which substantially retracted the statements repeatedly quoted by respondents as to the "untrammeled" nature of federal jurisdiction over treble-damage antitrust cases; and the Second Circuit's earlier opinion in the same case *which explicitly held that the federal court was barred by § 2283 from enjoining the state proceeding* (*Lyons* v. *Westinghouse Electric Corp.*, 201 F.2d 510 (2d Cir.), *cert. denied*, 345 U.S. 923 (1953)).

England v. *Louisiana Medical Examiners*, 375 U.S. 411 (1964) (Resp. Br. 80), is equally inapposite. The special

[19] Respondents wrongly state (p. 73) that Vendo's state court judgments are protected by "substantial bonds." These bonds, however, are mere personal undertakings of respondents Stoner and Stoner Investments (apart from the nominal $2,500 bond required by the District Court) and are *unsupported by any corporate surety or other guarantee of full payment*. (See Plaintiffs' Exhibits 326 and 327.) Moreover, the financial statements attached to the Security Agreement (Plaintiffs' Exhibit 328) and subsequent financial statements (e.g., Plaintiffs' Exhibits 363 and 364) show a substantial decline in net worth during the period since the judgments were entered in 1971.

"procedure" endorsed in that case applies only where a federal court, in observance of the doctrine of abstention, refers the parties to a state court to obtain an interpretation of state law questions arising in the context of the federal suit. The decision does not even suggest that litigants in such cases may, upon their return to the federal court, challenge the result reached by the state court, either by injunction or otherwise. Indeed, to permit such a challenge would contravene the entire purpose of the federal court's abstention.

Respondents' reliance on *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944) (Resp. Br. 81), is also misplaced. No injunction was at issue there, much less an injunction against a state court proceeding. The issue in that case was the *res judicata* effect of a prior federal suit on the defendant's counterclaim for antitrust treble-damages. No issue of federalism or comity between state and federal courts was presented by that case. Nor, as already stated, is petitioner here contesting respondents' right to proceed with their treble-damage claims. Only the preliminary injunction against petitioner's state court proceedings is at issue on this appeal.

III. THE DISTRICT COURT LACKED JURISDICTION TO REVERSE, REVIEW OR REVISE THE FINAL JUDGMENTS BY COLLATERAL ATTACK.

Respondents do not argue that a federal district court has jurisdiction under the federal antitrust laws (or any other statute) to review and reverse the final judgment of a state court of competent jurisdiction. Yet they suggest (Resp. Br. 83), without citing a shred of supporting authority, that final state court judgments are not entitled to full faith and credit and may be annulled by a District Court's injunction where, as in this case, the District Court upon preliminary examination of the state court proceedings concludes that they were predicated upon "illegal agreements" and were "part of an anticompetitive scheme."

In substance and effect, such a procedure constitutes a review by collateral attack upon the state court judgments. Indeed, the District Court itself recognized that it was engaged in just such an enterprise, and the Court of Appeals specifically approved (App. 289). The District Court stated that "The final Illinois Supreme Court opinion makes such a review imperative" because allegedly "The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anticompetitive scheme" (App. 232).

The District Court thus assumed, without explanation, that it had jurisdiction to review the antitrust aspects of the state court proceedings, while admitting that it did "not have jurisdiction to review the due process aspects" of those proceedings (App. 232). Neither form of review, however, is permitted by any statute or constitutional provision. The holding of this Court in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), is applicable regardless of whether the alleged defects complained of in the state court proceedings are attacked as violative of the Constitution, as in *Rooker*, or of the federal antitrust laws, as in the present case.

Moreover, the District Court's stated factual premise concerning the nature of the Illinois Supreme Court's decision was also erroneous. Far from having "expressly refused" to consider respondents' antitrust contentions, the Illinois Supreme Court in fact expressly recognized that respondents had withdrawn their federal antitrust defense prior to the trial on remand in 1971 (App. 117). And after due consideration of respondents' claims under the Illinois Antitrust Act, the Illinois Supreme Court held that "the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants" (App. 118). In short, the Illinois Supreme Court held that the Illinois Act was inapplicable and did not consider the federal antitrust defense because it had been deliberately withdrawn several years earlier and never again reasserted.

CONCLUSION

For the reasons stated above and in our main brief, it is respectfully submitted that this Court should reverse the judgment of the Court of Appeals and vacate the preliminary injunction prohibiting enforcement of the final state court judgments.

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Dated: December 15, 1976.

SUPPLEMENT A

STONER STATEMENT TO FEDERAL TRADE COMMISSION CONCERNING 1959 ACQUISITION

Respondents (pp. 6-11) make numerous assertions concerning the alleged background and purpose of Vendo's 1959 acquisition of the assets of Stoner Manufacturing (now Stoner Investments). We do not believe it is relevant to the issues before the Court to undertake a response to each of these assertions. Most, however, are answered by Mr. Stoner's own signed statement to the Federal Trade Commission dated April 6, 1959, concerning the transaction (PX2 contained in Plaintiffs' Exhibit 301), which states in pertinent part:

My name is Harry B. Stoner. I am President of Stoner Mfg. Corp., an Illinois corporation, with its principal office at Aurora, Illinois.

• • •

My own health has never been robust, partly because of an arrested case of infantile tuberculosis, on account of which I lost a year of school when I was in the Seventh Grade. Nevertheless, I had always felt able to, and had, managed the business without difficulty until the death of Clarence R. Adelberg on May 30, 1958. Mr. Adelberg was Executive Vice-President at the time of his death. While he was with the company, he had complete charge of sales and also assisted in other executive and administrative decisions. I concentrated on engineering, and the general supervision of the business. I was able to be absent from Aurora while Mr. Adelberg was living, knowing that he could handle anything that might come up. Since his death there has been a void in management which has not yet been filled.

I have not been in a position to look for someone to replace Mr. Adelberg and have not felt that an offer of employment by the company would be attractive to a top executive, in view of the fact that because of health or age

situations existing in the family, I could not offer continuity to a prospective executive.

Six weeks after Mr. Adelberg's death, in about the middle of July, 1958, I contracted virus pneumonia. About the tenth of August, I collapsed and was placed in an oxygen tent. Diabetes was diagnosed.

The first week in September I was again placed in an oxygen tent. At this time, I felt that my entire nervous system was affected. As already stated, my health has never been robust and I also suffered from hypertension, but have never felt unable to carry on until the incident just described, and since. Now the nervous and physical strain incident to the whole responsibility of running the business has become too much.

After my second oxygen tent experience, I decided the Company's assets should be sold. I did not feel equal to the task of continuing responsible for running the business alone. We had no one available to replace me. Neither my brother Ray nor any other present officer is qualified to take over as the chief executive officer. I am concerned because the principal asset of each of the stockholders is his Stoner Mfg. Corp. stock. I feel that the strain of my responsibility is too great in the present state of my health. In addition, if some thing should happen to me, without Adelberg being replaced the family would be confronted with the double problem of Federal Estate Tax with no sufficient source of liquid assets and the lack of top management personnel to operate the business. These are the reasons which prompted the decision to sell.

The negotiations which led to the recent contract for the sale of the assets of Stoner Mfg. Corp. to The Vendo Company commenced in October, 1958. These negotiations were themselves a strain on me. In January, 1959, I went to Mayo Brothers Clinic at Rochester, Minnesota, for a complete physical checkup and particularly to find out the cause of my trouble in breathing. My breathing trouble

is partly nervousness and hypertension aggravated by the recent virus pneumonia, and partly old lung damage. Otherwise they found no specific pathology but recommended that I take it easier in business, get rid of some of my responsibilities and spend more time in recreational or diversionary activities.

Since September, 1958, I have been absent from the office from time to time on account of my health, for perhaps a total of six weeks, plus short time on other days.

Vendo seemed to be a logical purchaser because no other prospective purchaser had any management people capable of running the business without being educated in the vending machine field. Vendo being experienced in that field will be able to take over with less assistance from me.

I am interested in having the business continued, by people who have capable management and who will continue to employ and be compatible with our present officers and employees and with a minimum of dislocation of business practices and employment security. I do not want to let the business just drift and carry on its own momentum, because this cannot continue indefinitely and there is great risk of loss involved in such a program. I attribute our poor showing in sales for 1958, and since, at least in part to the management difficulties I have already described.

Dated April 16, 1959.

/s/ HARRY B. STONER
Harry B. Stoner

SUPPLEMENT B

THE RECORD CONCERNING DELAY OF THE FEDERAL CASE

Respondents repeatedly assert (pp. 27-28, 40, 80-81) that there was an "understanding" and even an "agreement" between respondents and Vendo that proceedings in this federal case be delayed pending final determination of the state court proceedings. This contention is false. As shown below, respondents unilaterally insisted on delay of the federal proceedings, even after they had withdrawn their federal antitrust defense in the state court case. On the other hand, counsel for Vendo repeatedly urged, over the objections of respondents, that this case be brought to trial notwithstanding that the state court appeals were still in progress.

This federal action was filed in October, 1965, about two months after Vendo filed its state suit. It was originally assigned to Judge Joseph Sam Perry, who conducted the first hearing in the case on November 12, 1965. However, at the request of respondents, this case was held on Judge Perry's passed-case calendar from 1966 until 1969, during the initial trial and appeal of the state case.

On November 5, 1969, Judge Perry noted, upon hearing the case called: "That is my oldest case, if I am not mistaken." Mr. Sheridan, one of the attorneys for respondents, then explained to Judge Perry that in Vendo's state case the Illinois Appellate Court had directed the state trial court to consider Stoner's federal antitrust defense on remand:

> "MR. SHERIDAN: . . . It is remanded now and the defense will be considered, presumably, by the trial court. Mr. Sears is appearing before Judge Peterson in Geneva tomorrow, as a matter of fact. The mandate has been filed and they are going to try to get it set for hearing.
>
> "THE COURT: So that that will be litigated.
>
> "MR. SHERIDAN: The federal antitrust question will be." (Transcript, November 5, 1969, pp. 3-4.)

On May 18, 1970, Judge Perry on his own motion dismissed the action for want of prosecution. Respondents then filed a motion to vacate the order and reinstate the case. At the hearing on this motion on May 26, 1970, the following colloquy occurred:

> "THE COURT: I have no objection to doing it, except one thing: I want it tried. It is old. It should either be tried or you should enter into a stipulation that the parties will abide the outcome of the other cases that are pending.
>
> "MR. BAKER [one of the attorneys for respondents]: I do not think that it is quite fair, your Honor, to ask us to enter into that stipulation. I am willing to go ahead.
>
> "THE COURT: I do not want you to enter into a stipulation, but the case is fice [sic] years old. I just want the case tried.
>
> "MR. BAKER: We have been litigating your Honor.
>
> "THE COURT: I know, but not litigating my case.
>
> "MR. BAKER: We originally put in on your passed-case calendar, because—
>
> "THE COURT: I did, and I kept it there. It has been there for two years, and the time has come for me to have that case tried. I am perfectly willing to vacate my order and reinstate it. All I want is the case tried." (Transcript, May 26, 1970, p. 2.)

The Court set the case for trial on November 23, 1970. On October 20, 1970, however, the case was reassigned to Judge McGarr. On November 23, 1970, Mr. Baker appeared before Judge McGarr and explained:

> "MR. BAKER: . . . This case was filed in 1965, at which time there was a case pending in Kane County. Judge Perry indulged us for several years by putting it over, because some of the issues or many of them might well be decided there.

"Now, this case has been to the Appellate Court once, it's back down in the trial court for further evidence. We have—so we think it would be a waste of the Court's time and that of the parties to have a trial in this case immediately." (Transcript, November 23, 1970, p. 2.)

On April 9, 1971, at the opening of the second trial in the state court case, respondents voluntarily withdrew their federal antitrust defense. (App. 82.)

On August 24, 1971, after appraising the Court of Vendo's $7.5 million judgments in the state court suit (rendered August 13, 1971), and saying that these judgments would be appealed, Mr. Baker argued that trial of the federal suit should be postponed until the state case was completely disposed of. (Transcript, August 24, 1971, p. 2.)

At the status report before Judge McGarr on November 23, 1971, Mr. Baker once again argued that no further action should be taken in the federal case until the state court litigation was resolved. Judge McGarr continued the case until March 26, 1972. (Transcript, November 23, 1971, pp. 1-4.)

On February 3, 1972, the case was reassigned to Judge McLaren, who scheduled a status report for February 17, 1972. Counsel for Vendo received no notice of this status report and were not present. Counsel for the plaintiffs, after stating their version of the case to the judge, proposed that it be delayed pending the outcome of their state appeal. The Court then set June 16, 1972 for the next status report. (See Transcript, February 17, 1972.)

Counsel for Vendo, on learning of the February 17 status report, filed a motion to vacate the order continuing the case until June 16th. This motion was argued on March 10, 1972. At the hearing, Mr. Ochsenschlager on behalf of

Vendo argued against any further delay in the resolution of this federal suit:

"Now, we contend that this Court would not be aided in any way by awaiting the determination of the appeal that is now pending in the Appellate Court. . . .

"We feel that it would be better for all concerned, and we are the defendant, but we are urging that this cause we are here defending move ahead. . . .

"We are ready to move ahead in all phases of this case and think it should go ahead without regard to what happens in the State Court or what might happen." (Transcript, March 10, 1972, pp. 4-5, 7.)

The motion was, however, opposed by the respondents, and was denied by the District Court, thereby continuing the case until the previously scheduled date of June 16, 1972.

At the hearing before the Court on that date, the matter was further continued until September 15, 1972, once again over the protest of Vendo that the parties should proceed with this case. (Transcript, June 16, 1972, pp. 2-4.)

Thereafter, the case was continued on the same basis at each status report throughout 1972, 1973, and 1974, until after the Illinois Supreme Court had affirmed Vendo's judgments against Stoner and Stoner Investments in the state court case.